

of the maternal grandmother's home, nonetheless, I found from the photographs that the maternal grandmother's home was at least equally neat inside. Further, the wife had indeed booked a low-cost flat to which she would shift with the child and her mother. This should improve the situation for the wife further.

Regarding the blood abnormality which the infant was said to have, in view of its description, the mother could probably be affected similarly, and if this was so, other things being equal, the mother, having had to take care of herself by avoiding those drugs over the years could have more experience and been more knowledgeable than any of her in-laws or the husband. If she was not in fact similarly affected, she would be equally aware of the danger of those drugs for which she appeared to have a list also, and then in such event, as between the husband and the wife, this factor of ensuring that the child kept clear of those drugs would be equally balanced.

The last factor I had to consider was the conduct of the parties bearing in mind the paramount consideration of the infant's welfare. While the wife complained of lack of any love or affection from the husband, both seemed to accuse each other of being hot-tempered. More probably than not, I found that a lot of their marital problems could have been avoided if the husband had provided a matrimonial home away from her in-laws. Apparently the home of the husband's parents was not regarded by her as such, and in my view for good reasons. She had to live with the relatives of the husband; this was bound to produce a great deal of tension and unhappiness. In my view the husband was certainly aware of the desirability to so stay away and any failure to take such step was conduct which was questionable and the wife's complaint on this score was entirely justifiable. The hot temper which the wife was said to have could equally be attributed to the husband, for both parties naturally exhibited it when they quarrelled with each other.

I ought to say a few words about the desirability, if not a necessity of a married couple staying away from the in-laws and living in a separate home. From my experience from the cases in court, more marriages have gone on the rocks on the frequent underlying cause of not having a home of their own and therefore in living together with the in-laws than for any other cause, which on reflection, would usually appear to have derived from that underlying cause. It is high time courts regard the failure of a husband to provide such a separate home, (which could even be a rented room), as a material ground when hearing claims for divorce, maintenance, and custody whenever such an issue is credibly raised and when such issue is relevant. In the instant case I found the complaint of the failure to provide a separate home for the wife as having tipped the balance in favour of the wife when the court considered the question

whether the wife was an unimpeachable parent in this case.

In connection with the question of the separate home, expectations of women have changed dramatically with the increased and increasing awareness of their rights in society. Such awareness has been brought to Malaysia also by the winds of change that have blown in from the West, together with the motor cars, aeroplanes and the franchise to women; while women were prepared to live together with their in-laws at the beginning of this century or before the Second World War with equanimity and resignation, this position has largely ceased, if not completely, to exist. The court's attitude to this question of a separate home should not remain immutable and must change with the times.

After considering all the circumstances, bearing in mind constantly the predominant factor of the child's welfare, I granted custody to the mother with daily access to the father for certain hours, for the benefit of the infant who might miss his father very much, and also to make the transitional period a very smooth one as far as possible.

Application dismissed.

Solicitors: *Gibb & Co; Lim Boon Seng & Co.*

Reported by Ng Sheau Jiuan

Foo Poh Sang & Ors v Yuen Lum Sdn Bhd (Asia Commercial Finance (M) Bhd, Intervener)

HIGH COURT (IPOH) – ORIGINATING MOTION NO 32-95-87
(CIVIL SUIT NO 22-183-87)
PEH SWEE CHIN J
6 OCTOBER 1988

Land Law – Sale agreement between plaintiffs and defendant – Land registered in defendant's name – Defendant charged land to chargee – Default in payment of purchase price by defendant – Caveat lodged by plaintiffs to protect interest under sale agreement – Interlocutory injunction subsequently obtained by plaintiffs against defendant restraining it from disposing of land – Application by chargee to set aside interlocutory injunction – Whether court's removal of caveat meant that injunction ought also to be removed – Whether injunction was merely a caveat under guise of injunction – National Land Code 1965, s 323(1)

The plaintiffs entered into a sale agreement with the defendant to sell a piece of land to the defendant. The land was subsequently registered in the name of the defendant who created charges on it in favour of the intervener, the chargee. The defendant defaulted in the payment of the purchase price and the plaintiffs applied for and obtained an interlocutory injunction restraining the defendant from disposing of the land until further order. The chargee applied to intervene in the proceedings and to set aside the interlocutory injunction.

In support of its application, the intervener contended that since the plaintiffs' caveat against the land (which was earlier lodged to protect their interest by virtue of the sale agreement) had been removed by the court, the injunction was bad and ought to be removed. It also contended that the injunction order was merely a caveat under the guise of an injunction.

Held, dismissing the intervener's application to set aside the interlocutory injunction wholly:

(1) The intervener's right as a chargee under the National Land Code could not be interfered with by the plaintiffs. The court therefore varied the injunctive order by adding the words to the effect that nothing in the order should prejudice the foreclosure proceedings under the National Land Code which the intervener had intended to take in its capacity as chargee.

(2) There are real, though subtle, differences between a caveat and an injunction. A caveator, when called upon to justify his caveat, would have to satisfy the court that he has a caveatable interest in the land in question. On the other hand, an injunction can restrain a person from doing anything, not just things concerning land. When it applies to land, it is not dependent on the presence or absence of any caveatable interest for it to issue. A caveatable interest is a relevant but by no means sine qua non for an injunction to issue. As such, the submission that once the caveat was removed the injunctive order could not remain is not valid.

[Editorial Note: The intervener has appealed to the Supreme Court vide Civil Appeal No 244 of 1988.]

Cases referred to

- 1 *S & F International Ltd v Trans-con Engineering* [1985] 1 MLJ 62 (refd)
- 2 *Ninemia Maritime Corporation v Trave* [1984] 1 All ER 398 (refd)
- 3 *Eng Mee Yong v V Letchmanan* [1979] 2 MLJ 212 (refd)
- 4 *Nanyang Development v How Swee Poh* [1970] 1 MLJ 145 (refd)
- 5 *American Cyanamid v Ethicon Ltd* [1975] AC 396 (refd)

Legislation referred to

National Land Code 1965 s 323(1)

Ronnie Teo, Ng Seng Lee and Foo San Choong for the plaintiffs.

Ngan Siong Hing for the intervener.

Cur Adv Vult

Peh Swee Chin J: The above-named intervener had applied by summons to be added as a party to the proceedings and thereafter to set aside an interlocutory injunction granted ex parte in favour of the plaintiffs against the defendant, (and be it noted, not against the intervener). This court granted the application of the intervener to intervene but dismissed the intervener's application to set aside the said interlocutory injunction wholly, with the court instead varying the said interlocutory injunction to protect what appeared to be the interest of the intervener as chargee of the land to which the interlocutory injunction had related; and ordering the plaintiffs to pay half the costs of the application to the intervener.

A Despite the nature of the order made the intervener has now appealed from it. It will be necessary to recapitulate the facts leading to the order made.

B The plaintiffs entered into an agreement with the defendant to sell a piece of land to the defendant who apparently was a housing developer with provisions for payment of the purchase price of \$2.4 million of which \$40,000 was paid on signing the agreement. The defendant had defaulted, leaving a balance sum of \$1,460,000 still unpaid.

C It was provided in the agreement for the plaintiffs to execute a valid and registrable transfer of the land and for the said transfer to be held by stakeholders until a bank loan (on the security of the title to the land) had been obtained and the purchaser was ready to pay the balance of the purchase price.

D The land was subsequently registered in the name of the defendant who had created charges on it in favour of the intervener, the chargee, for sums which appeared to be well in excess of \$2.5 million.

E It was also provided, inter alia, in the agreement that on breach of obligations including one of paying the instalments towards the purchase price, the plaintiffs would be entitled to forfeit the deposit or 10% of the purchase price whichever was the lesser. The plaintiffs issued a notice of legal proceedings, followed by the writ of action.

F The plaintiffs claimed in the action against the defendant for an order of transfer or retransfer of the land, injunction against disposal of the land etc, and in the alternative, the balance sum of \$1,460,000, damages for breach and costs.

G The defendant entered an appearance on 13 January 1988 and before that, the plaintiffs applied for and obtained on 5 October 1987 the interlocutory injunction ex parte, restraining the defendant, by its servants, or agents etc from selling or otherwise disposing of the land until further order.

H The land had since been sub-divided into a large number of lots on which houses were being built and sold to a fairly large number of purchasers who had apparently obtained housing loans from the intervener from whom the defendant had apparently obtained what is known in the building trade as 'bridging finance' to build the houses.

I Earlier, the plaintiffs had lodged a caveat against the land apparently to attempt to protect their interest by virtue of the agreement. Such caveat was removed by the court apparently on an application by the intervener who then applied to intervene and set aside the interlocutory injunction.

The intervener, in support of its application, said that it was the chargee of the land (it goes without saying that it must be also the chargee of the sub-divided lots derived from the original land), charged to secure a sum of more than \$2.5 million as particularized in the affidavit filed. It said that since there was a caveat (which I mentioned earlier as having been since removed), the injunction was bad and ought to be removed. Further, there was no caveatable interest. The intervener further referred to innocent purchasers of some of the sub-divided lots who had obtained housing loans from the intervener and the injunction was affecting the intervener and the innocent purchasers; and stated that the civil action here was a matter strictly between the plaintiffs and defendant, the present suit having nothing to do with the intervener and the innocent purchasers. The intervener lastly said that in view of default of certain payments on the part of the defendant, it wished to take legal action under the National Land Code as chargee (for order of sale by public auction).

The plaintiffs in reply said, *inter alia*, that the injunction was obtained solely against the defendant, and that an injunction could be applied for in addition to a caveat already lodged, and that the issue of caveatable interest was irrelevant in the present suit. On the complaint presumably that the innocent purchasers had failed to pay instalments of housing loans it was brought about by the defendant stopping work of construction. The plaintiffs further said that it was clear that the injunction obtained would not affect 'sales' or 'transfers' of the sub-divided lots prior to the date of the injunction order and that none of the innocent purchasers had sought to intervene in these proceedings. The interest of the innocent purchasers had no bearing on the intended foreclosure proceedings by the intervener against the defendant and that the civil suit had nothing to do with the intervener.

Learned counsel for the intervener in his submission took two points in addition to what has been stated above by his client. First, the injunction could not remain when the caveat was removed as the injunction order was merely a caveat under the guise of an injunction. Secondly, since the plaintiffs had totally divested themselves of their interest in the land, it would be inequitable for the injunction to remain.

In reply, learned counsel for the plaintiffs said the injunction was merely an analogy of the caveat (and was not the same). The plaintiffs were not disputing the rights of the intervener as a chargee under the National Land Code but the injunction obtained in the form of a *mareva* injunction was to stop the defendant from dissipating its assets. The plaintiffs had mentioned fraud by the intervener on the innocent purchasers and also on the interveners on account of granting further loan on ex-

A ecuting further charge or charges and on paying the defendant 100% of housing loans when houses were completed to the extent of 80% only. Learned counsel submitted that the remedy for the intervener should be by way of foreclosure proceedings to which the plaintiffs would not object. Counsel said that the intervener's manager had said also that it was a *mareva* injunction that was obtained herein.

B Learned counsel for the intervener had, in reply, submitted that the injunction was not a *mareva* injunction and if it was, the criteria had not been met. Alleged fraud was uncalled for.

C In my view, it was apparent that the innocent purchasers had never intervened in the proceedings to, *inter alia*, set aside the injunction. Learned counsel for the intervener was of course not acting for such innocent purchasers, who would be perfectly entitled to so intervene, if they thought it fit, and any court would grant any remedy which they ought to deserve on such intervention. Save speaking in connection with the obligation by the innocent purchasers to keep up with instalments of housing loans in respect of which they had allegedly become recalcitrant, causing concern to the intervener, learned counsel for the intervener could not have spoken for the innocent purchasers with any authority.

E In my view the intervener's right as a chargee under the National Land Code could not be interfered with by the plaintiffs who admitted as much and expressly stated they had no objection to such right. The court had therefore varied the injunctive order by adding the words to the effect that nothing in the order should prejudice at all in any way the foreclosure proceedings under the National Land Code which the intervener had intended to take in its capacity as chargee. The coast was thus clear for it to exercise its right for all its remedies.

G However, the intervener wanted more, ie the removal of the injunction itself, seemingly taking up the cudgels on behalf of the innocent purchasers as well. Its manager said it was a *mareva* injunction that the plaintiffs had obtained and the plaintiffs readily conceded it was. The intervener said to the effect that the requirements had not been complied with by the plaintiffs who said they had. Assuming that the intervener had the right of complaint about such requirements (though it had no such right), had the plaintiffs then satisfied the requirements for obtaining a *mareva* injunction?

I First, the plaintiffs had satisfied the court that they had a good arguable case with regard to the balance of the purchase price remaining unpaid. Secondly, they had satisfied the court that there was a risk of dissipation of the only known asset, ie the land, as after all the defendant had been selling the sub-divided lots derived from the land, and further that the probity of the defendant

was not to be relied on by the failure to pay instalments towards the purchase price without even bothering to give any explanation therefor. Thirdly, the court took into account the plaintiffs' evidence and unfortunately none from the defendant, who proffered no evidence. Please see the case of the Federal Court in *S & F International Ltd v Trans-con Engineering*,¹ and *Ninemia Maritime Corporation v Trave*.²

The plaintiffs had satisfied the requirements for a mareva injunction, (of which the injunctive order in question was one), to be issued. I must hasten to add that it still remains for the innocent purchasers to rise from their slumber on whatever rights they should perceive they have.

I found the allegation of fraud from the plaintiffs against the intervener too far-fetched to be of any value in this application to set aside the injunction.

Finally, I will deal now with the major submission of the intervener that the injunctive order in question was a caveat in the guise of an injunction and once the caveat was removed, the injunctive order could not remain.

The court could not accede to this submission. In my judgment, there are real, though subtle, differences between the two. A caveator, when called upon to justify his caveat, would have to satisfy the court (when he is not a registered owner) that he has a caveatable interest in the land in question. Please see *Eng Mee Yong v V Letchmanan*³ and *Nanyang Development v How Swee Poh*.⁴ Caveatable interest is, of course, very fortunately and conclusively though compendiously set out in s 323(1) of the National Land Code as follows:

323(1) The persons and bodies at whose instance a private caveat may be entered are –

- (a) any person or body claiming title to, or any registrable interest in any alienated land or any right to such title or interest;
- (b) any person or body claiming to be beneficially entitled under any trust affecting any such land or interest; and
- (c) the guardian or next friend of any minor claiming to be entitled as mentioned in paragraph (b).

On the other hand, an injunction can restrain a person from doing anything, not just concerning land. When it applies to land, it is not dependent on the presence or absence of any caveatable interest for it to issue, such as a mareva injunction, the requirements of which were discussed earlier. A caveatable interest is, of course, a relevant but by no means sine qua non for an injunction to issue.

Just to mention another difference mentioned by the learned Lord Diplock himself in *Eng Mee Yong*,³ a caveat is registered by the Registrar of Titles always ex parte acting in an administrative capacity and not, if I may myself add, in a judicial or quasi-judicial capacity.

A The similarities between a caveat and an interlocutory injunction concerning land lie mainly in the matter of the balance of convenience which was itself explained by the learned Lord Diplock in *American Cyanamid v Ethicon Ltd*.⁵ The matter of balance of convenience arises when a court hears an application until final trial, for example, for extending a caveat or continuing or applying for an interlocutory injunction.

B Again, apart from and before the balance of convenience spoken of above arises, an applicant for an interlocutory injunction or for continuing it must satisfy the court that there is a serious question to be tried; a question that is not frivolous or vexatious, as regards his claim at the trial for a permanent injunction or other remedy in aid of which the interlocutory injunction is sought.

C Similarly, an applicant (caveator) for extending a caveat would have to satisfy the court that there is a similarly serious question for trial as regards his claim to a registrable interest in the land etc under s 323 of the National Land Code. Please see his Lordship's elucidation of the same in the *Eng Mee Yong* case.³

D In view of what has been stated above and especially the fact that both parties appeared and professed to treat the injunction in question as one of mareva's type with which I also agreed, the submission about the removal of the caveat in question involving ipso facto the discharge of the interlocutory injunction fell to the ground.

E I therefore, as stated earlier, varied the injunctive order so as not to prejudice in any way the intended foreclosure proceedings at the instance of the intervener/chargee, but dismissed his application to set it aside wholly.

Order accordingly.

G Solicitors: *Yeoh Kian Teik & Co; Abbas & Ngan*.

Reported by *Ng Sheau Jiuan*

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